## Mak Siew Wei v Dato' Dr Norbik Bashah bin Idris & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCC-283–09 OF 2015
MOHD NAZLAN JC
31 MARCH 2016

*Companies and Corporations — Mergers and take overs — Underlying principles — Mandatory general offer by controlling shareholders — Failure of — Whether shareholder aggrieved by breach — Whether shareholder could vindicate rights — Whether shareholder had locus standi to exercise private cause of action — Whether there was contravention of s 218(2) of the Capital Markets and Services Act 2007 — Whether application to strike out claim disclosed reasonable cause of action — Rules of Court O 18 r 19(1)(a)*

The first to seven defendants filed three different applications in encls 15, 16 and 17 pursuant to O 18 r 19(1)(a) of the Rules of Court 2012 to strike out the plaintiff's statement of claim. The plaintiff, a shareholder of the eighth defendant, commenced a writ action for a declaration that the seven defendants were acting in concert to obtain control of the eighth defendant company and that they had contravened s 218(2) of the Capital Markets and Services Act 2007 ('the CMSA') and s 9(1) of the Malaysian Code on Take-Overs and Mergers 2010 ('the Code') for their failure to undertake a mandatory offer for the shares in the eighth defendant company. The defendants argued that the plaintiff's claim was premature and disclosed no reasonable cause of action because the alleged violation of the CMSA or the Code did not give rise to a private cause of action under s 357 of the CMSA in the absence of a ruling by the Securities Commission ('the SC') on the said breach. The defendants alleged that the plaintiff did not have the requisite locus standi. The defendants further submitted that the plaintiff's claim on the tort of unlawful means conspiracy must also necessarily fail because it was only actionable if there was a prior ruling of the same by the SC (*Shahidan Shafie v Atlan Holdings Sdn Bhd & Anor) ('Shahidan*'s case'). The plaintiff, however, contended that he was entitled to commence the action against the seven defendants and relied on s 360 of the CMSA to argue that the said provisions permits any person aggrieved by an alleged breach of a relevant requirement to apply to the High Court for various remedies

**Held**, dismissing the defendants' applications:

(1) Section 357 gives the statutory right to a person who suffers loss by reason of a breach of any provision of Part VI (which includes the requirement to undertake a mandatory general offer under s 218) to institute civil

proceedings in order to recover from the person in default. A person who claims to be aggrieved by a breach of s 218 could resort to ss 357 and 360 of the CMSA to vindicate his rights. The words of these two statutory provisions provide for the claimant to institute a civil suit to enforce his right for recovery under s 357 and pray for other specified reliefs under s 360 accordingly. This could be done without the involvement of the SC because it was not mentioned in these sections or any other parts of the CMSA that any form of determination by the SC such as in the nature of a ruling was a prerequisite. Further, ss 358 and 360(1)(a) and (b) separately confer on the SC the same statutory right to pursue civil proceedings against the person in default, as those embodied in ss 357 and 360(1)(d) vis a vis any person aggrieved by the breach. Thus, this provides legislative clarity on the scope of the private right to institute suit for recovery under s 357(1) (see paras 19 & 22).

(2) The private actions conferred by the CMSA on the aggrieved persons are similar to s 358 vis a vis s 357, mirrored by the civil enforcement powers of the SC to effect recovery on behalf of those who suffer loss because of the relevant breaches, as found in ss 200, 201(5) and 211, respectively. The inter-relatedness of the enforcement mechanism was thus further reflected in the enactment of the various provisions in the CMSA on the powers of the SC to sue defaulters on behalf of the persons who suffer losses under ss 200, 211 and 358 on the one hand, together with the statutory right of aggrieved persons to institute civil suits to recover from defaulters in ss 199, 201, 210 and 357 on the other hand, all of which appearing alongside the criminal enforcement powers of the SC in the same piece of legislation that was the CMSA. In situations relevant to the enforcement of private right under ss 199, 201(1) and 210, it was difficult to appreciate the practicality of the person who suffers loss having to first secure a determination by the SC that a relevant breach had indeed been committed, before the private suit may be allowed to progress (see paras 35–36).

(3) Section 360(1)(d) permits an aggrieved person to make an application to the High Court for various remedies specified in the said s 360(A)–(O), provided it could be shown that 'it appears' to the court that the other person had contravened the relevant requirement such as the mandatory general offer rule, and that the applicant investor was aggrieved by such contravention. The plain reading of s 360(1)(d) does not specify any hurdle against the aggrieved person before he can make an application to court (see paras 38–39).

(4) The existence of the various provisions as legislated in the CMSA signified two important points. First, it further reinforces the regulatory philosophy that promotes shareholder activism which includes encouraging them to initiate various actions directly and secondly, it

nevertheless maintains the ability of the regulators, in particular the SC to also have similar powers, in addition to its existing arsenal of enforcement capabilities, in keeping with the overarching rationale of ensuring strong supervision of the capital markets, and firmly supported by legislative provisions on criminal, civil and administrative actions, and with the civil actions to be complemented by way of private litigation as well. And there was as such no reason for the CMSA to be construed to impose the requirement that to justify private litigation, the consent or ruling of the SC is to be made a prerequisite; not for take over provisions, nor for any other provisions in the CMSA where the right of investors to sue defaulters for recovery was so expressly permitted (see para 41).

(5) Under s 217(4), the SC has the discretion, not the obligation to issue rulings on the interpretation of the Code, on the practice and conduct of parties involved in take over offers This provision does not state that a ruling would be necessary under s 357. The said ruling is to give effect to the provisions of the CMSA on take overs and the Code, chief of which that seeks to uphold the principle of fair and equal treatment to all shareholders is the mandatory offer requirement, whereas the crux of s 357 is the different emphasis of private litigation recovery by parties who suffer losses due to breaches The statutory obligation to undertake a mandatory general offer arises from the requirement in s 218(2) imposed on an acquirer who has acquired control. Countless mandatory general offers had taken place in the country pursuant to acquisitions triggering s 218(2) and (3) of the CMSA without the necessity of the SC first issuing a ruling to confirm the need to do so (see paras 44–45).

(6) The decision in *Shahidan*'s case was based on the construction of s 153 of the Securities Commission Act 1993, which has since been repealed. Although subsequently resurrected in identical version, it was removed from the SCA and instead now found in s 357 in an entirely different legislative framework and contextual existence of the much consolidated CMSA, justifying a fresh examination of the true jurisdictional remit of s 357. In the context of the CMSA, there was no conceptual difficulty with the notion that an investor who suffers loss as a result of a breach of the mandatory general offer obligation pursues a civil recovery action against the person in breach without a prior ruling from the SC determining whether there was a breach in the first place. Section 357 does not even imply that a ruling from the SC was a sine qua non to an institution of civil proceedings by a person who suffers loss (see paras 53–54).

(7) The fundamental and pivotal point was for all intents and purposes for the claimant to establish his case of a contravention by the alleged defaulter occasioning a loss to the former on the civil standard of proof of a balance of probabilities This requires the parties to invoke the civil

litigation court processes and procedures principally in respect of pleadings and discovery to present a case of contravention of the relevant mandatory offer provisions requiring a ruling by SC to be obtained before a private action under s 357 (and s 360) was an unnecessary requirement and may tantamount to an unwarranted impediment to and unnecessary fetter on the statutory right of an aggrieved person to seek recovery by way of civil proceedings expressly conferred by the CMSA which was in any event introduced to promote the institution of private enforcement actions by shareholders in the first place. Thus, the plaintiff was sufficiently conferred by s 357 of the CMSA the locus standi to institute civil proceedings against the seven defendants to seek the remedies for the loss he claimed to have suffered by reason of the alleged contravention of the mandatory general offer provisions of s 218 and it was competent for the plaintiff to exercise such private cause of action without the necessity of the SC first making a ruling on the breach in question (see paras 59, 61 & 67).

(8) The basis for the striking out application was the argument on the absence of locus standi resulting in the claim by the plaintiff not disclosing a reasonable cause of action under limb (a) of r 19. The contention that the plaintiff did not have a private cause of action in the absence of a ruling by the SC was not a tenable interpretation of s 357 of the CMSA. The claim was to get the court's assistance for various remedies for being an aggrieved party who suffered loss as a result of the defendants' alleged transgression in pursuance of ss 357 and 360 of the CMSA. This disclosed a reasonable cause of action in the claim filed by the plaintiff. In any event, as the issue in the instant case was predominantly, if not entirely, one on a question of law, having decided on the existence of locus standi without the necessity for a prior ruling be made by the SC under ss 357 and 360, it was inescapable that the striking out application could not succeed (see paras 65–66).

**[Bahasa Malaysia summary**

Defendan-defendan pertama hingga ketujuh telah memfailkan permohonan berbeza dalam lampiran-lampiran 15, 16 dan 17 menurut A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah 2012 untuk membatalkan penyataan tuntutan plaintif. Plaintif, seorang pemegang saham defendan kelapan, telah memulakan writ tindakan untuk deklarasi bahawa ketujuh-tujuh defendan itu bertindak bersama untuk memperoleh kawalan syarikat defendan kelapan dan bahawa mereka telah melanggar Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP') dan s 9(1) Kanun Pengambilalihan dan Penggabungan Malaysia 2010 ('Kanun') kerana kegagalan mereka melaksanakan tawaran mandatori untuk saham-saham dalam syarikat defendan kelapan. Defendan-defendan berhujah bahawa tuntutan plaintif adalah pramatang dan tidak menunjukkan kausa tindakan yang munasabah kerana pelanggaran yang dikatakan terhadap

APMP atau Kanun itu tidak menimbulkan kausa tindakan persendirian di bawah s 357 APMP dengan ketiadaan keputusan oleh Suruhanjaya Sekuriti ('SS') berhubung pelanggaran tersebut. Defendan-defendan mengatakan bahawa plaintif tidak mempunyai lokus standi yang diperlukan. Defendan-defendan selanjutnya berhujah bahawa tuntutan plaintif berhubung tort konspirasi sumber tidak sah juga harus sewajarnya gagal kerana ia hanya boleh diambil tindakan jika terdapat keputusan terdahulu yang sama oleh SS (*Shahidan Shafie v Atlan Holdings Sdn Bhd & Anor*) ('kes *Shahidan*'). Plaintif, bagaimanapun, berhujah bahawa dia berhak memulakan tindakan terhadap ketujuh-tujuh defendan itu dan bergantung kepada s 360 APMP untuk berhujah bahawa peruntukan tersebut membenarkan mana-mana orang terkilan oleh pelanggaran yang dikatakan berhubung keperluan relevan agar memohon kepada Mahkamah Tinggi untuk pelbagai remedi.

**Diputuskan**, menolak permohonan-permohonan defendan-defendan:

(1) Seksyen 357 memberikan hak statutori kepada seseorang yang mengalami kerugian oleh sebab pelanggaran mana-mana peruntukan Bahagian VI (yang termasuk keperluan melaksanakan tawaran am mandatori di bawah s 218) bagi memulakan prosiding sivil bertujuan utuk mendapat balik daripada orang yang ingkar. Seseorang yang mendakwa telah terkilan oleh pelanggaran s 218 boleh menggunakan ss 357 dan 360 APMP untuk mewajarkan hak-haknya. Kata-kata kedua-dua peruntukan statutori tersebut memperuntukkan agar penuntut memulakan guaman sivil bagi melaksanakan haknya untuk dapatan semula di bawah s 357 dan memohon untuk relief spesifik lain di bawah s 360 sewajarnya. Ini boleh dilakukan tanpa penglibatan SS kerana ia tidak dinyatakan dalam seksyen-seksyen tersebut atau mana-mana bahagian APMP lain bahawa apa-apa bentuk penentuan oleh SS seperti yang bersifat suatu keputusan adalah satu prasyarat. Selanjutnya, ss 358, 360(1)(a) dan (b) secara berasingan memberikan hak statutori yang sama kepada SS untuk memulakan prosiding sivil terhadap orang yang ingkar, sepertimana termaktub dalam ss 357 dan 360(1)(d) vis a vis mana-mana orang yang terkilan oleh pelanggaran. Oleh itu, ini memberikan badan perundangan yang jelas berhubung skop hak persendirian untuk memulakan guaman bagi dapatan semula di bawah s 357(1) (lihat perenggan 19 & 22).

(2) Tindakan persendirian yang diberikan oleh APMP kepada orang yang terkilan adalah sama dengan s 358 vis a vis s 357, yang memberikan kuasa penguatkuasaan sivil SS yang sama untuk melaksanakan dapatan semula bagi pihak mereka yang mengalami kehilangan akibat pelanggaran berkaitan, sepertimana terdapat dalam ss 200, 201(5) dan 211, masing-masingnya. Berkait sama mekanisme penguatkuasaan dengan itu selanjutnya digamberkan dalam Enakmen pelbagai peruntukan dalam APMP berhubung kuasa SS untuk menyaman pengingkar bagi pihak

orang yang mengalami kerugian di bawah ss 200, 211 dan 358 dalam satu keadaan, bersama dengan hak statutori orang yang terkilan untuk memulakan guaman sivil bagi mendapatkan semula daripada pengingkar dalam ss 199, 201, 210 dan 357 dalam keadaan lain, kesemuanya dilihat sebaris dengan kuasa penguatkuasaan jenayah SS dalam perundangan sama iaitu APMP. Dalam keadaan berkaitan dengan penguatkuasaan hak persendirian di bawah ss 199, 201(1) dan 210, ia adalah sukar untuk memahami keperluan seseorang yang mengalami kerugian untuk pertama sekali memperoleh penentuan oleh SS bahawa terdapat pelanggaran relevan yang memang telah dilakukan, sebelum guaman persendirian boleh dibenarkan untuk diteruskan (lihat perenggan 35–36).

(3) Seksyen 360(1)(d) membenarkan orang yang terkilan untuk membuat permohonan kepada Mahkamah Tinggi untuk pelbagai remedi yang dinyatakan dalam s 30(A)–(O), dengan syarat ia boleh ditunjukkan bahawa 'it appears' kepada mahkamah bahawa orang lain telah melanggar keperluan yang relevan seperti peraturan tawaran am mandatori, dan bahawa pemohon pelabur terkilan oleh sebab pelanggaran tersebut. Bacaan biasa s 360(1)(d) tidak menyatakan apa-apa halangan terhadap orang yang terkilan sebelum dia boleh membuat permohonan kepada mahkamah (lihat perenggan 38–39).

(4) Kewujudan pelbagai peruntukan sepertimana digubal dalam APMP menunjukkan dua perkara penting. Pertama, ia selanjutnya menguatkuasakan semula falsafah pengawalseliaan yang menggalakkan tindak cergas pemegang saham yang mana termasuklah menggalakkan mereka memulakan pelbagai tindakan secara langsung dan keduanya, ia walau apa pun mengekalkan keupayaan pengawal selia, khususnya SS untuk juga mempunyai kuasa yang sama, selain daripada kemampuan penguatkuasaan sedia adanya yang luas, dalam mengekalkan rational memastikan pengawalselian kukuh pasaran modal, dan disokong penuh oleh peruntukan perundangan berhubung tindakan jenayah, sivil dan pentadbiran, dan dengan tindakan sivil itu digunakan melalui litigasi persendirian juga. Dan tiada sebab langsung untuk APMP ditafsir sebagai mengenakan keperluan di mana untuk mewajarkan litigasi persendirian, persetujuan atau keputusan SS perlu membuat prasyarat; bukan untuk peruntukan pengambilalihan, ataupun untuk mana-mana peruntukan lain dalam APMP di mana hak pelabur-pelabur untuk menyaman pengingkar bagi dapatan semula dibenarkan dengan jelas (lihat perenggan 41).

(5) Di bawah s 217(4), SS mempunyai budi bicara, bukan obligasi untuk mengeluarkan keputusan berhubung penafsiran kanun tersebut, berhubung amalan dan perbuatan pihak-pihak yang terlibat dalam tawaran pengambilalihan. Peruntukan ini tidak menyatakan bahawa satu

keputusan adalah perlu di bawah s 357. Keputusan tersebut perlu memberi kesan kepada peruntukan APMP berhubung pengambilalihan dan Kanun tersebut, penting untuk tujuan mengekalkan prinsip layanan adil dan saksama kepada semua pemegang saham yang mana adalah keperluan tawaran mandatori, manakala inti pati s 357 adalah penekanan berbeza berhubung dapatan semula litigasi persendirian oleh pihak-pihak yang mengalami kerugian akibat pelanggaran. Obligasi statutori untuk membuat tawaran am mandatori timbul daripada keperluan dalam s 218(2) yang dikenakan ke atas pemeroleh yang memperoleh kawalan. Banyak tawaran am mandatori telah berlaku dalam negara menurut pemerolehan yang menggunakan s 218(2) dan (3) APMP tanpa keperluan SS terlebih dahulu mengeluarkan keputusan untuk mengesahkan keperluan berbuat demikian (lihat perenggan 44–45).

(6) Keputusan kes *Shahidan* adalah berdasarkan penggubalan s 153 Akta Suruhanjaya Sekuriti 1993, yang mana telahpun dimansuhkan. Walaupun telah digubal semula dalam versi yang sama, ia telah dialihkan daripada ASS dan sebaliknya kini didapati dalam s 357 dalam kerangka perundangan yang berbeza langsung dan kewujudan kontektual APMP yang digabungkan itu, mewajarkan pemeriksaan baru berhubung bidang kuasa perundangan sebenar s 357. Dalam konteks APMP, tiada kesukaran dasar konsep dengan tanggapan bahawa pelabur yang mengalami kerugian akibat pelanggaran obligasi tawaran am mandatori memulakan tindakan dapatan semula sivil terhadap orang yang melanggar tanpa keputusan terdahulu daripada SS menentukan sama ada terdapat pelanggaran pada mulanya. Seksyen 357 tidak menyatakan bahawa keputusan daripada SS adalah *sine qua non* untuk memulakan prosiding sivil oleh orang yang mengalami kerugian (lihat perenggan 53–54).

(7) Perkara asas dan utama adalah untuk semua niat dan tujuan penuntut membuktikan kesnya yang mana pelanggaran oleh pengingkar yang dikatakan telah menyebabkan kerugian kepada penuntut berdasarkan piawai bukti sivil atas imbangan kebarangkalian. Ini memerlukan pihak-pihak menggunakan proses dan prosedur mahkamah litigasi sivil terutamanya berkaitan pliding dan penzahiran kepada kepada kes pelanggaran peruntukan tawaran mandatori yang relevan. Untuk menghendaki satu keputusan oleh SS diperolehi sebelum tindakan persendirian di bawah s 357 (dan s 360) adalah keperluan yang tidak perlu dan adalah sama seperti penghalang yang tidak wajar kepada dan belenggu yang tidak perlu ke atas hak statutori orang yang terkilan untuk memohon dapatan melalui prosiding sivil yang nyata diberikan oleh APMP yang mana dalam apa keadaan diperkenalkan untuk menggalakkan pemulaan tindakan penguatkuasaan persendirian oleh pemegang saham pada mulanya. Oleh itu, plaintif telah diberikan

secukupnya oleh s 357 APMP lokus standi untuk memulakan prosiding sivil terhadap ketujuh-tujuh defendan bagi memohon remedi untuk kerugian yang didakwanya telah dialami oleh sebab pelanggaran yang dikatakan kepada peruntukan tawaran am mandatori s 218 dan ia adalah kompetan untuk plaintif menggunakan kausa tindakan persendirian tanpa keperluan SS terlebih dahulu membuat keputusan berhubung pelanggaran yang dipersoalkan (lihat perenggan 59, 61 & 67).

(8) Asas untuk membatalkan permohonan adalah hujah berhubung ketiadaan locus standi yang mengakibatkan dalam tuntutan oleh plaitif tidak menunjukkan kausa tindakan munasabah di bawah cabang (a) k 19. Hujah bahawa plaintif tidak mempunyai kasa tindakan persendirian dalam ketiadaan keputusan oleh SS bukan penafsiran yang dapat dipertahankan tentang s 357 APMP. Tuntutan itu adalah untuk mendapatkan bantuan mahkamah untuk pelbagai remedi bagi orang yang terkilan yang mengalami kerugian akibat pelanggaran yang dikatakan menurut ss 357 dan 360 APMP. Ini menunjukkan kausa tindakan munasabah dalam tuntutan yang difailkan oleh plaintif. Dalam apa keadaan, oleh kerana isu dalam kes ini adalah lebih banyak, jika bukan keseluruhannya, suatu berhubung persoalan undang-undang, setelah memutuskan tentang kewujudan lokus standi tanpa keperluan untuk keputusan terdahulu dibuat oleh SS di bawah ss 357 dan 360, ia tidak dapat dielakkan bahawa pembatalan permohnan tidak akan berjaya (lihat perenggan 65–66).]

**Cases referred to**

*Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1, HC (refd)
*Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449; [2013] 1 CLJ 24, FC (refd)
*Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor* [2003] 6 MLJ 49, HC (refd)
*Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, SC (refd)
*Extreme System Sdn Bhd v Ho Hup Construction Company Bhd & Ors* [2010] MLJU 487, HC (refd)
*Letang v Cooper* [1965] 1 QB 222, CA (refd)
*Low Chee & Sons Sdn Bhd & Anor v Extreme System Sdn Bhd and another appeal* [2013] 1 MLJ 650, CA (refd)
*Nescajaya Sdn Bhd v Suairah bt Parigula & Ors* [2011] 9 MLJ 774, HC (refd)
*Petaling Tin Bhd v Lee Kian Chan* [1994] 1 MLJ 657; [1994] 2 CLJ 346, SC (refd)
*Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174, HL (refd)
*See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2013] 3 AMR 385, CA (refd)

*Shahidan bin Shafie v Atlan Holdings Bhd & Anor* [2013] 7 MLJ 215; [2013] 4 CLJ 1029, HC (refd)
*Shahidan bin Shafie v Atlan Holdings Sdn Bhd & Anor* [2015] MLJU 1944, CA (distd)
*Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733; [2016] 3 CLJ 19, FC (refd)
*Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158; [2012] 8 CLJ 678, CA (distd)
*Tuan Hj Zulkifli bin Hj Hussain & Ors v IOI Corp Bhd & Ors* [2012] 7 MLJ 215, HC (refd)
*Wong Lai Yoke & Ors v Mayban Securities Sdn Bhd and another appeal* [2014] 4 MLJ 731; [2012] 1 LNS 1424, CA (refd)
*X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152, HL (refd)
*Yukong Line Ltd of Korea v Rendsburg Investment Corp of Liberia & Ors (No 2)* [1998] 4 All ER 82, QBD (refd)

**Legislation referred to**

Capital Markets and Services Act 2007 ss 199, 200, 201, 201(1), (5), 210, 211, 217, 217(4), (5), 218, 218(2), (3), (4), 220, 220(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), (1)(g), (1)(h), (2), (3), 354, 357, 357(1), (2), 358, 360, 360(1), (1)(a), (1)(b), (1)(c), (1)(d), (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (K), (L), (M), (N), (O)
Companies Act 1965 ss 179, 181A
Corporations Act 2001 [AU] ss 1041I, 1317HA
Financial Services Act 2013
Financial Services and Markets Act 2000 [UK] s 90
Futures Industry Act 1993
Interpretation Acts 1948 and 1967 s 17A
Malaysian Code on Take-Overs and Mergers 2010 ss 9(1), 11
Rules of Court 2012 O 18 r 19(1)(a)
Rules of the High Court 1980 O 14A, O 18 r 19(1)
Securities Commission Act 1993 ss 15, 15(1), 33A, 33A(4), (5), (9), (10), 33D, 33D(1), (2), (3), 153, 155
Securities Industry Act 1983 ss 88A, 100

*Alex Tan Chie Sian (Wong Kian Kheong) for the plaintiff.*
*CM Owee (Owee & Ho) for the first and second defendants.*
*Tharminder Singh (Aravind with him) (Izral Partnership) for the third defendant.*
*Ben Lee (Gan & Zul) for the fourth, fifth, sixth and seventh defendants.*
*LM Chong (Rachel Lim with him) (Lim Chong Phang & Amy) for the eighth defendant.*

**Mohd Nazlan JC:**

INTRODUCTION

**[1]** This judgment deals with three different applications in encls 15, 16 and 17, filed by the first to seventh defendants, all of which under O 18 r 19(1)(a) of the Rules of Court 2012, to strike out the statement of claim of the plaintiff, who is a shareholder of SCANS Associates Bhd, a listed company which is also the eighth defendant herein, on the basis that the claim did not disclose a reasonable cause of action.

**[2]** This writ action by the plaintiff essentially seeks primarily a declaration that the seven defendants were acting in concert to obtain control of the eighth defendant company, that they had contravened s 218(2) of the Capital Markets and Services Act 2007 ('the CMSA') and s 9(1) of the Malaysian Code on Take-Overs and Mergers 2010 ('the Code') for their failure to undertake a mandatory offer for the shares in the eighth defendant company, and that as such they be ordered to make a mandatory general offer to ensure compliance with the said provisions and pay damages to the plaintiff for the losses allegedly suffered as a result of the breach.

**[3]** The defendants in the applications put forward the key contention that the suit should be struck out since the plaintiff did not have the requisite locus standi to pursue a claim on a mandatory general offer based on the alleged breach of the CMSA and the Code.

**[4]** I heard the applications on 11 January 2016 and dismissed the same on 27 January 2016 by providing the broad grounds for my decision not to strike out the suit. This judgment, which now contains the full grounds for my decision, discusses the singular issue of law on the true interpretation to be ascribed to s 357 of the CMSA and the extent of the private cause of action created thereunder.

SUMMARY OF SUBMISSIONS BY PARTIES

**[5]** In his amended statement of claim, the plaintiff pleaded two causes of action against the first to the seventh defendants alleged to have acted in concert in taking over control of the eighth defendant company without making a mandatory general offer, namely a breach of statutory duties under the CMSA, and the tort of 'unlawful means' conspiracy.

**[6]** The primary contentions of the seven defendants as contained in the written submissions for encls 15, 16 and 17 filed by the first and second defendants, the fourth to seventh defendants, and the third defendant,

respectively, are substantially similar. The main argument advanced by the defendants is that the plaintiff's claim is premature and discloses no reasonable cause of action because the alleged violation of the CMSA or the Code does not give rise to a private cause of action under s 357 of the CMSA in the absence of a ruling by the securities commission ('the SC') on the said breach. Thus the plaintiff does not have the requisite locus standi to make the claim, and the tort of unlawful means conspiracy, which is premised on the same alleged breach is equally unsustainable, justifying the striking out of the claim made by the plaintiff.

**[7]** The defendants anchor their challenge against the claim by the plaintiff on the unreported Court of Appeal decision in *Shahidan bin Shafie v Atlan Holdings Sdn Bhd & Anor* [2015] MLJU 1944 ('*Shahidan bin Shafie*'). The facts in *Shahidan bin Shafie*, like those in the instant case are, for the purposes of this judgment, less important than the legal issue it gave rise to. In essence, following a capital restructuring scheme of Naluri Bhd ('Naluri'), the respondents in that case were contended to have obtained control of Naluri without making a mandatory general offer for the remaining shares in Naluri as required by the CMSA and the Code. Like in the instant case, the plaintiff in *Shahidan bin Shafie* also prayed for an order that the defendants be required to undertake the mandatory offer. The Court of Appeal identified two issues which are also directly relevant to the instant case, as follows:

(i) Whether the plaintiff has the locus standi to launch the suit against the respondents in the context of the Securities Commission Act 1993?; and

(ii) If so, whether the plaintiff had proved that the respondents are legally required to make compulsory take-over offer to all shareholders of Naluri as prescribed by the SC and the Code?

**[8]** The Court of Appeal decided that the plaintiff did have a private cause of action under s 153 of the Securities Commission Act 1993 but, most importantly, after considering other provisions of the SCA found in ss 33A and 33D that clearly tasked the SC with the overall statutory responsibility to supervise take-overs in the country, qualified the position by holding that it 'exists only after a ruling by the securities commission'. Since no ruling was forthcoming from the SC, the plaintiff in *Shahidan bin Shafie* did not have the requisite locus standi to initiate a private civil suit against the respondents. The Court of Appeal did not therefore have to answer the second question on whether it was proven that the respondents were legally required to make the mandatory offer. It is apposite that I reproduce in full the relevant parts of the judgment in *Shahidan bin Shafie* on this crucial issue in order to provide a proper context to this important decision, as follows:

27. It is our view that premised on the aforesaid provisions, it can be said that it is the intention of Parliament for the Securities Commission to be tasked to supervise, regulate, issue rulings from time to time and enforce the practices of companies bound by the SC Act 1993 and the Take-Over Code. *The learned Judge in the High Court in fact found that the only remedy available to the Plaintiff was to complain to the Securities Commission about the conduct of the Defendants and if the Securities Commission failed to act or makes a ruling unfavorable to the Plaintiff, his only option was to apply to the Court for judicial review of the decision of the Securities Commission. In short the Plaintiff's remedy was one of public law.*

It is a cardinal rule of construction of statute that Courts must give the words used their natural meanings and applying the same, we cannot get away from the fact that the words used are also *quite explicit in giving a person who had suffered damage a private cause of action to recover the same from anyone who had failed to comply any provision of the law*.

...

29. *As we have intimated earlier, in construing* section 153 *we must take into consideration of other provisions in the SC Act to discern the context. Hence in doing so, we agree with learned counsel for the Defendants that the Plaintiff's right to sue can only exist when the Securities Commission had made a ruling.* In the case before us, Securities Commission must first make a ruling that the Defendants had acquired control of Naluri in the context of the relevant law and was required to make the mandatory take-over offer to the shareholders of the Naluri. From the Record of Appeal, it is undisputed that the Securities Commission was aware of the allegation of the Defendants having acquired control of Naluri and had sought clarification from the Board of Directors of Naluri. The Securities Commission after considering Naluri's clarification took no further action. As intimated above, the Plaintiff should have sought a review of the Securities Commission decision in Court. This he did not do. (Emphasis added.)

**[9]** In the instant case, it is not disputed that similarly no ruling has been made by the SC. As such, the defendants argued that following the decision in *Shahidan bin Shafie,* the same result should ensue and the plaintiff's action must therefore fail for lack of locus standi since the Court of Appeal had judicially determined the scope of s 153 of the SCA, which is identical to s 357 of the CMSA relied on by the plaintiff in the instant case. Although not stated by the defendants, I surmise that it would also be because the other former provisions concerning the powers of the SC in administering take-overs in the SCA, specifically ss 33A(4), 33A(5), 33D(1), (2) and (3) considered by the Court of Appeal in *Shahidan bin Shafie* are now also found in ss 217(4), 217(5), 220(1), 220(2) and 220(3) respectively, which ought thus to equally govern the situation in the instant case.

**[10]** The defendants further submitted that the claim on the tort of unlawful means conspiracy must also necessarily fail because it is, from the pleadings, based on the same alleged breach of the CMSA and the Code, which, following *Shahidan bin Shafie,* is only actionable if there is a prior ruling on the same by

the SC. The English High Court case of *Yukong Line Ltd of Korea v Rendsburg Investment Corp of Liberia & Ors (No 2)* [1998] 4 All ER 82 was referred to as an authority for the proposition that in an unlawful act conspiracy, the unlawful act relied upon must be actionable at the suit of the plaintiff.

**[11]** The plaintiff, in response, did not appear to have any answer to the submissions by the defendants on the absence of the private cause of action under s 357 in view of *Shahidan bin Shafie*, other than making the point that he is also entitled to commence the action against the seven defendants for the said contravention based on s 360 of the CMSA, which permits any person aggrieved by an alleged breach of a relevant requirement to apply to the High Court for various remedies specified therein. The plaintiff also argued that in respect of the claim on tort of conspiracy, the House of Lords had ruled in *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 that criminal conduct can constitute unlawful means in an unlawful means conspiracy and the claim is thus sufficiently actionable.

MY ANALYSIS FINDINGS

**[12]** Whilst being in full cognisant of the fact that this instant case revolves around the issue of locus standi which is undeniably similar to the one earlier decided by the Court of Appeal in *Shahidan bin Shafie*, and equally mindful of the doctrine of stare decisis and the resulting binding nature of the decision of the Court of Appeal on this court, I have arrived at a decision that appears to be inconsistent with the outcome of *Shahidan bin Shafie*. This is entirely however the result of the interpretive process that in my view justifies my distinguishing *Shahidan bin Shafie* in the manner that I shall next attempt to demonstrate, in the rest of this judgment.

**[13]** Based on my review of the relevant provisions of the CMSA (counsel for parties did not highlight many of the points I discuss below), I conclude that s 357 of the CMSA grants any person who claims to have suffered loss as a result of a breach by another in not complying with the mandatory general offer requirements, the right to recover by instituting civil proceedings against the person in breach, without the need for the SC to first make a ruling on whether certain parties have been acting in concert to obtain control, or that there was a breach as a result.

*The enforcement framework of the CMSA*

**[14]** The Court of Appeal in *Shahidan bin Shafie* deals with s 153 of the SCA (repealed by the Securities Commission (Amendment) Act 2007 effective 31 July 2007) which reads as follows:

A (1) A person who suffers loss or damage by reason of, or by relying on, the conduct of another person who has contravened any provision of Part VI or any regulations made under this Act may recover the amount of the loss or damage by instituting civil proceedings against the other person whether or not that other person has been charged with an offence in respect of the contravention or whether or not a
B contravention has been proved in a prosecution.

(2) Notwithstanding the provisions of any written law relating to limitation of time, an action under subsection (1) may be begun at any time within six years from the date on which the cause of action accrued or the date on which the person referred to in subsection (1) became aware of the contravention, whichever is the later.

C

**[15]** This provision is identical to s 357 of the CMSA. Whilst it is not doubted that s 357 of the CMSA is in pari materia with s 153 of the SCA, *Shahidan bin Shafie* concerned the application of the relevant take-over provisions in the SCA which were in force then. The Court of Appeal was not
D presented with the opportunity to consider the context of the relevant provisions of the CMSA which had not yet been introduced to apply to the facts at the relevant time, and which Act has since consolidated the principal legislative provisions governing issue of securities and take-overs previously found in the SCA, as well as the entirety of the Securities Industry Act 1983
E and the Futures Industry Act 1993, both of which have thus been repealed. Furthermore, and in any event, *Shahidan bin Shafie* did not have to examine the scope of s 360 of the CMSA which however is relied on by the plaintiff in the instant suit, in addition to s 357 of the same Act.

F

**[16]** It is therefore imperative that the breadth and width of the framework of enforcement mechanisms embodied in the CMSA be properly appreciated. In essence, the CMSA provides for an impressive array of criminal, civil and administrative provisions on actions and remedies to prevent, combat and deal
G with transgressions of the securities laws. Their application can be most aptly demonstrated in respect of the very substantive provisions which are the subject of the main underlying instant suit. Take-over provisions fall under Division 2 of Part VI of the CMSA. It is worthy of emphasis that previously, these were found in Division 2 of Part IV of the SCA. The Court of Appeal in *Shahidan bin Shafie* dealt with these former SCA provisions.

H

**[17]** First and foremost, the failure to undertake a mandatory general offer is a criminal offence under sub-s (4) of s 218 of the CMSA which states as follows:

(1) A person who makes a take-over offer shall do so in accordance with the
I provisions of the Code, guidelines, directions, practice notes and any ruling issued by the Commission.

(2) Subject to section 219, an acquirer who has obtained control in a company shall make a take-over offer for the remaining voting shares in accordance with the provisions of the Code, guidelines, directions,

practice notes and any ruling issued by the Commission.

(3) Subject to section 219, an acquirer who has obtained control shall not acquire any additional voting shares in that company except in accordance with the provisions of the Code, guidelines, directions, practice notes and any ruling issued by the Commission.

(4) A person who contravenes subsection (1), (2) or (3) commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding ten years or to both".

It is for the SC to first initiate any investigation, and any resulting decision to prosecute for violation of s 218(2) or (3) can only be pursued if the prior requisite written consent of the public prosecutor is obtained under s 375 of the CMSA.

**[18]** Secondly, and separately, under s 220(1), the SC may, notwithstanding s 218(4), decide to take any of the actions specified in paras (a)–(h) of s 220(1) which include the SC issuing a direction that the person in breach comply with the requirement being violated, imposing a penalty not exceeding RM1m and requiring restitution be made in favour of any person aggrieved by the breach. s 220 thus empowers the SC to take administrative actions to deal with transgressions of the relevant take-over provisions (whilst s 354 contains similar provisions to deal with most other breaches under the CMSA), which may be undertaken without having to bring the offender to the court of law. A not dissimilar set of provisions, if not with more enhanced powers has also been introduced into the Financial Services Act 2013 for the Central Bank. For completeness, the pertinent parts of s 220(1) for present purposes provide as follows:

(1) Notwithstanding the provisions of subsection 218(4), where any person who is under an obligation to comply with, observe or give effect to the provisions of this Division, the Code, guidelines, directions, practice notes or any ruling issued by the Commission, contravenes or fails to comply with, observe or give effect to any such provision or ruling, the Commission may take one or more of the following actions:

(a) direct the person in breach to comply with, observe or give effect to any such provision of this Division, the Code, guidelines, directions, practice notes or rulings;

(b) impose a penalty, in proportion to the severity or gravity of the breach on the person in breach, but in any event not exceeding one million ringgit;

(c) reprimand the person in breach;

(d) require a stock exchange or derivatives exchange to deprive the person in breach from having access, directly or indirectly, to the facilities of the stock exchange or derivatives exchange;

A (da) prohibit the person in breach from having access, directly or indirectly, to the capital market;

...

(h) require the person in breach to take such steps as the Commission may B direct to remedy the breach or mitigate the effect of such breach, including making restitution to any other person aggrieved by such breach;

(i) where the person in breach is an adviser, refuse to accept or consider any submission relating to any matter under this Division from such person.

C (2) The Commission shall give a written notice to a person in breach of its intention to take action under subsection (1) and shall give the person in breach an opportunity to be heard prior to it taking any action under subsection (1).

(3) The court may, in a case where the Commission gives a direction under paragraph (1)(a) or (h), on an application by the Commission, make an order D directing the person in breach to comply with, observe or give effect to those provisions of the Code, guidelines, directions, practice notes or rulings.

...

(8) Nothing in this section shall preclude the Commission from taking any of the E actions that it is empowered to take under this Act or any of the provisions of the securities laws against the person in breach.

(8A) Where a person has failed to comply with any direction issued under subsection (1), the Commission may deprive such person from any capital market services by requiring a licensed person, registered person or capital F market service provider not to act or continue to act for such person, for any period as may be determined by the Commission.

(9) For the purposes of this section:

'breach' means a failure to comply with, observe or give effect to the provisions G of this Division, the Code, guidelines, directions, practice notes or any ruling issued by the Commission, in circumstances where there is an obligation to do so;

'person in breach' means a person who contravenes or fails to comply with, observe or give effect to the provisions of this Division, the Code, guidelines, H directions, practice notes or any ruling issued by the Commission, in circumstances where the person is under an obligation to do so.

**[19]** Thirdly, s 357, which is the focus of the instant case, gives the statutory right to a person who suffers loss by reason of a breach of any provision of Part I VI (which, for the avoidance of doubt, includes the requirement to undertake a mandatory general offer under s 218) to institute civil proceedings in order to recover from the person in default. For completeness, even though it is identical to the now repealed s 153 of the SCA, it is important that the entirety of s 357 is stated in full, as follows:

(1) A person who suffers loss or damage by reason of, or by relying on, the conduct of another person who has contravened any provision of Part VI or any regulations made under this Act may recover the amount of the loss or damage by instituting civil proceedings against the other person whether or not that other person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution.

(2) Notwithstanding the provisions of any written law relating to limitation of time, an action under subsection (1) may be begun at any time within six years from the date on which the cause of action accrued or the date on which the person referred to in subsection (1) became aware of the contravention, whichever is the later.

**[20]** Fourthly, under s 358, the SC may also, if it considers it in the public interest to do so, institute civil proceedings against the defaulter to recover on behalf of any person who suffers loss by reason of the violation. The relevant parts of s 358 read as follows:

(1) The Commission may, if it considers that it is in the public interest to do so, recover on behalf of a person who suffers loss or damage by reason of, or by relying on, the conduct of another person who has contravened any provision of Part VI or any regulations made under this Act, the amount of the loss or damage by instituting civil proceedings against the other person whether or not that other person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution.

(2) Notwithstanding the provisions of any written law relating to limitation of time, an action under subsection (1) may be begun at any time within six years from the date on which the cause of action accrued or the date on which the Commission became aware of the contravention, whichever is the later.

(3) Any loss or damage recovered by the Commission under subsection (1) shall be applied:

(a) firstly, to reimburse the Commission for all costs of the investigation and proceedings in respect of the contravention; and

(b) secondly, to compensate persons who suffer loss or damage by reason of, or by relying on, the conduct of another person who has contravened any provision of Part VI or any regulations made under this Act.

...

(c) Any right of action that is conferred under this section is in addition to any right that such person has under any other law.

**[21]** Fifthly, both the SC and any person aggrieved by the relevant transgression (as well as the exchange holding company or the stock exchange),

may also, separately, seek the assistance of the court, under s 360(1)(a) and (d) respectively, since a contravention of the requirement to undertake a mandatory general offer permits the court to make various orders stated in paras (A)–(O) of the s 360(1), the relevant parts of which read as follows:

> (1) Where:
>
> (a) on an application by the Commission, it appears to the court that:
>
> (i) there is reasonable likelihood that any person will contravene a relevant requirement;
>
> (ii) any person has contravened a relevant requirement; or
>
> (iii) any person has contravened a relevant requirement and that there are steps which could be taken to remedy the contravention or to mitigate the effect of such contravention, including making restitution to any other person aggrieved by such contravention, whether or not that person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution;
>
> (b) on an application by the Commission, it appears to the court that any person has failed or is failing to comply with any direction issued by the Commission under section 354, 355 or 356;
>
> (c) on an application by an exchange holding company, a stock exchange, a derivatives exchange or an approved clearing house, as the case may be, it appears to the court that:
>
> (i) any person has contravened a relevant requirement; or
>
> (ii) any person has contravened a relevant requirement and that there are steps which could be taken for remedying the contravention or mitigating the effect of such contravention; or
>
> (d) *on an application by any person aggrieved by an alleged contravention by another person of a relevant requirement, it appears to the court that:*
>
> (i) the other person has contravened the relevant requirement; and
>
> (ii) the applicant is aggrieved by the contravention,
>
> the court may, without prejudice to any order it would be entitled to make otherwise than pursuant to this section, make one or more of the following orders:
>
> (A) an order restraining or requiring the cessation of the contravention;
>
> ...
>
> (D) an order restraining the person from acquiring, disposing of or otherwise dealing with, assets which the court is satisfied such person is reasonably likely to dispose of or otherwise deal with;
>
> (E) an order directing a person to dispose of any securities that are specified in the order;

(F) an order restraining the exercise of any voting or other rights attached to any securities that are specified in the order;

...

(J) where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do any act or thing that he is required to do under a relevant requirement, an order requiring such person to do such act or thing;

...

(M) an order requiring that person, or any other person who appears to have been knowingly involved in the contravention, to take such steps as the court may direct to remedy it or to mitigate its effect including making restitution to any other person aggrieved by such contravention;

...

(P) any ancillary order deemed to be desirable in consequence of the making of an order under any of the preceding provisions of this subsection.

...

(4) Where an application is made to the court for an order under paragraph (1)(J), the court may grant the order:

(a) where the court is satisfied that the person has refused or failed to do the required act or thing, whether or not it appears to the court that the person intends to again refuse or fail, or continue to refuse or fail, to do the required act or thing; or

(b) where it appears to the court that in the event that such an order is not granted, it is likely that the person will refuse or fail to do the required act or thing, whether or not the person has previously refused or failed to do the act or thing and whether or not there is any imminent risk of damage to any person if the person required to do such act or thing refuses or fails to do so.

...

(9) The proceeds of the dealing in or disposal of securities or derivatives under paragraph (1)(I) shall be paid into the court, and any person claiming to be beneficially entitled to the whole or any part of such proceeds may, within thirty days of such payment into the court, apply to the court for payment out of the proceeds to him.

(10) A person who contravenes:

(a) an order under subsection (1) that is applicable to him;

(b) a requirement of a receiver appointed by order of the court under subsection (1); or

(c) a requirement of the Commission or trustee appointed by order of the court under paragraph (1)(I),

commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding ten years or to both.

(11) Subsection (10) does not affect the powers of the court in relation to the punishment of contempt of court.

(12) The court may rescind, vary or discharge an order made by it under this section or suspend the operation of such an order.

(13) For the purposes of this section, 'relevant requirement':

...

(c) in relation to an application by the aggrieved person, means a requirement:

(i) which is imposed by or under this Act;

(ii) which is imposed as a condition or restriction of any approval or licence that is given or issued under or pursuant to this Act or any securities laws; or

(iii) which is imposed by or under the rules of a stock exchange, a derivatives exchange or an approved clearing house.

(14) An application made pursuant to this section shall not prejudice any other action that may be taken by the Commission, exchange holding company, stock exchange, derivatives exchange, approved clearing house or aggrieved person, as the case may be, under any securities laws or any other law or rules.

*Rule on statutory construction*

**[22]** These enforcement mechanisms can be initiated and pursued by either the SC (ie ss 218, 220, 358 and 360) or the persons aggrieved by the breach (ss 357 and 360). These other provisions were not considered in *Shahidan bin Shafie*. It is, in my view, thus quite plain and obvious that a person who claims to be aggrieved by a breach of s 218 (on the failure by the person in breach extending a mandatory general offer) can resort to ss 357 and 360 of the CMSA to vindicate his rights. I am further of the view that the words of these two statutory provisions are clear and if literally read, which should indeed be the case given the trite rule of statutory construction, provide for the claimant to institute a civil suit to enforce his right for recovery under s 357 and pray for other specified reliefs under s 360 accordingly. And crucially for present purposes, this can be done without the involvement of the SC because first, it is not mentioned in these sections or any other parts of the CMSA that any form of determination by the SC such as in the nature of a ruling is a prerequisite and secondly, ss 358 and 360(1)(a) and (b) separately confer on the SC precisely substantially the same statutory right to pursue civil proceedings

against the person in default, as those embodied in ss 357 and 360(1)(d) vis a vis any person aggrieved by the breach.

**[23]** The imperative of applying the construction that promotes the literal and plain meaning of statutes cannot be emphasised enough. This is always the first rule of interpretation that ought to be followed, even in the face of the provision of s 17A of the Interpretation Acts 1948 and 1967. This proposition of law was lucidly clarified by the Federal Court in the case of *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449; [2013] 1 CLJ 24. It is important that I reproduce the relevant parts of the judgment of Zulkefli Ahmad Makinudin CJ (Malaya) as follows:

> [18] Section 17A of the Interpretation Act provides that:
>
> > A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object.
> >
> > On the proper application of the provision of the said s 17A of the Interpretation Act we would refer to the case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 4 CLJ 195 wherein this court had laid down the principles inter alia as follows:
>
> In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed) says at p 566:
>
> > (1) Legislation is always to be understood first in accordance with its plain meaning.
> >
> > (2) Where the plain meaning is in doubt, the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.
> >
> > (3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.
> >
> > (4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.
> >
> > (5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation.
>
> The choice prescribed in s 17A of '... a construction that would promote the

purpose or object underlying the Act... shall be preferred to a construction that would not promote that purpose or object ...' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question of another meaning will not arise. Thus, it is only when a provision is capable of bearing two or more different meanings can s 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation. The principles set out in the preceding paragraphs will therefore be relevant to the operation of s 17A.

**[24]** On the premise of the aforesaid rule of interpretative process, it is in my view only natural, and thus compelling, for a plain meaning of the provisions as they manifestly appear in ss 357 and 360(1)(d) of the CMSA be construed to be the correct reading of the same. This would retain the clear differences created by the CMSA in making available the availability of various enforcement options.

**[25]** It is clear beyond doubt that s 357(1) may be invoked regardless whether the offence relating to the failure to undertake the general offer has been proven by way of a conviction, or even whether the defaulter has been charged with the said offence. This provides legislative clarity on the scope of the private right to institute suit for recovery under s 357(1).

**[26]** It is only if the SC decides to invoke s 358 to recover on behalf of those aggrieved by way of civil proceedings that the outcome of the private claim under s 357 may be affected because in both situations, recovery is from the same person alleged to have been in breach, whereby in a civil action instituted by the SC, the requirement under s 358 is for the costs incurred by the SC to be first reimbursed from the amount so recovered.

**[27]** A contrary construction on the private statutory right of the persons who suffer losses to sue the defaulter would otherwise invite a certain degree of incoherence, both conceptually, as well as in practical terms, if, despite the aggrieved persons and the SC each having the independent right under different but clearly demarcated statutory basis (ss 357 and 358 respectively) to initiate civil proceedings for recovery for the same breach, the exercise of that right by the former is qualified by the requirement (not stipulated under the CMSA, expressly or even by implication) that it could only proceed if the SC has made a prior determination in respect of the breach in question. I should also add that *Shahidan bin Shafie* too did not consider the presence, and relevance of the former identical version of the present s 358 of the CMSA in the form of the now repealed s 155 of the SCA.

*Regulatory philosophy of public and private enforcement of the capital markets*

**[28]** It is an established and integral element of the regulatory philosophy of the securities and capital markets that public and private aspects of securities enforcement are not only important, but also complementary and inter-related. It is critical for market confidence that the complementarity of the roles of public and private enforcement be firmly acknowledged and put in place. I need only refer to the *Corporate Governance Blueprint 2011* issued by the SC which makes the following pertinent observations about the state of play on enforcement of corporate governance related offences:

> Good corporate governance is shaped by the complementary and interdependent efforts of all stakeholders. The efforts of regulators in strengthening the legal and regulatory framework and ensuring effective supervision and enforcement are just one part of the overall measures required to strengthen corporate governance. Companies, shareholders and reputational intermediaries need to step up their efforts in exercising their respective responsibilities for ensuring good governance. In this context, self and market discipline must complement regulatory discipline to ensure integrity, confidence and fairness in the markets.
>
> Market discipline must dis-incentivise poor corporate conduct through its assessment of corporate performance as reflected in stock prices, bond spreads and credit ratings. Companies must embrace the need for ethical practices, and directors must discharge their fiduciary duties by ensuring integrity, transparency and accountability. *Above all, shareholders must empower themselves to be more assertive in demanding corporate accountability*. Where there is failure in such obligation, action must be taken.
>
> Effective public and private enforcement reinforces self-discipline as the real threat of legal action compels companies to tighten their governance processes to ensure conduct consistent with the law.
>
> *In this regard, Malaysian laws empower shareholders to seek civil remedies through private enforcement actions. However it is generally observed that the passive nature of shareholders, paired with a habitual reliance on regulators to detect wrong-doing and initiate investigations, puts the burden of enforcement solely on governmental bodies.* (Emphasis added.)

**[29]** The blueprint highlights that Malaysia has undertaken a series of reforms to strengthen its laws to ensure effective enforcement. Other than amendments to the companies legislation such as the introduction in 2007 of the statutory derivative action under s 181A of the Companies Act 1965, reforms of securities laws include enabling the SC to pursue civil action for market misconduct offences and empowering individuals to pursue civil action against those who have committed market misconduct offences. It further states:

A The right to institute private enforcement action is well established. However, there are impediments that discourage shareholders from pursuing such actions, thus perpetuating their reliance on public enforcement.

B **[30]** The SC concludes the subject by stating that its recommendations to address the impediments would be twofold, namely that funding of litigation by third parties needs to be studied further in order to facilitate private action and the incorporation of a provision to enable the SC to petition the court for a remedy in cases where the affairs of a listed company are being conducted in a manner oppressive or unfairly prejudicial to the shareholders' interest be considered.

C

**[31]** All this makes it manifest how important private litigation is for the well-functioning of a credible securities markets and the efforts by the SC to encourage the resort to greater private litigation given the patent lack, if not total absence of the same, further reaffirms the complementary but pivotal role private civil remedy is intended to serve vis a vis SC public enforcement actions.

D

E **[32]** And equally clearly, the blueprint however contains no suggestion, even implicitly, that private litigation under securities laws can or should only be actionable with a prior determination by the SC in respect of the relevant breach, for otherwise this could reasonably be argued to have the effect of creating further impediment that makes civil actions an even more unattractive option, and where aggrieved persons would, if a determination by the SC is made a prerequisite, instead have an even greater dependency on public enforcement to continue to vindicate their rights.

F

*The CMSA does not limit private civil action only to s 357*

G

**[33]** Further, yet another aspect of the CMSA which did not have to be considered by *Shahidan bin Shafie* is that the essence of s 357(1) conferring on those who suffer losses by reason of a contravention by another the private right to sue for recovery by way of civil proceedings is also similarly substantially contained in other provisions of the CMSA. It can be found in s 199 relating to breaches of securities offences such as market rigging, market manipulation and securities fraud. For clarity, it provides as follows:

H

I (1) A person who suffers loss or damage by reason of, or by relying on, the conduct of another person who has contravened sections 175, 176, 177, 178, 179 or 181 may recover the amount of loss or damage by instituting civil proceedings against the other person, whether or not the other person has been charged with an offence in respect of the contravention or, whether or not a contravention has been proved in a prosecution.

(2) This section shall not affect any liability under any other written law in respect of the conduct constituting the contravention.

**[34]** A similarly worded provision is also found in s 201 of the CMSA concerning breaches of insider trading provisions, as well as s 210 pertaining to breach of provisions on prohibited conduct for futures contracts. It is imperative that these provisions be reproduced hereunder:

Section 201

(1) A person who suffers loss or damages by reason of, or by relying on, the conduct of another person who has contravened Section 188 may recover the amount of loss or damages by instituting civil proceedings against the other person, whether or not the other person has been charged with an offence in respect of the contravention or, whether or not a contravention has been proved in a prosecution.

Section 210

(1) A person who suffers loss or damage by reason of, or by relying on, the conduct of another person who has contravened section 202, 203, 204, 205, 206, 207 or 208, may recover the amount of loss or damage by instituting civil proceedings against the other person, whether or not the other person has been charged with an offence in respect of the contravention or, whether or not a contravention has been proved in a prosecution.

(2) This section shall not affect any liability under any other written law in respect of the conduct constituting the contravention.

**[35]** In all such situations, the private actions conferred by the CMSA on the aggrieved persons are, similar to s 358 vis a vis s 357 discussed earlier, mirrored by the civil enforcement powers of the SC to effect recovery on behalf of those who suffer loss because of the relevant breaches, as found in ss 200, 201(5) and 211, respectively, as provided hereunder:

Section 200

(1) Where it appears to the Commission that any person has contravened section 175, 176, 177, 178, 179 or 181, the Commission may institute civil proceedings in the court against that person, whether or not that person has been charged with an offence in respect of the contravention, or whether or not a contravention has been proved in a prosecution.

...

Section 201

(5) Where:

(a) an insider:

(i) acquired or agreed to acquire securities; or

(ii) procured another person to acquire or agree to acquire securities,

in contravention of subsection 188(2); or

(b) an insider communicated information referred to in subsection 188(1) to another person, in contravention of subsection 188(3),

and such securities were permitted to be traded on a stock market of a stock exchange, then, whether or not the insider had been charged with an offence in respect of the contravention or whether or not the contravention had been proved in a prosecution, the Commission may, if the Commission considers that it is in the public interest to do so, by civil action, take any or both of the following actions, against the insider: ...

Section 211

(1) Where it appears to the Commission that any person has contravened section 202, 203, 204, 205, 206, 207 or 208, the Commission may institute civil proceedings in the court against that person, whether or not such person has been charged with an offence in respect of the contravention or, whether or not a contravention has been proved in a prosecution, the Commission may, if it considers that it is in the public interest to do so, by civil action against such person in contravention ...

**[36]** The inter relatedness of the enforcement mechanism is thus further reflected in the enactment of the various provisions in the CSMA on the powers of the SC to sue defaulters on behalf of the persons who suffer losses under ss 200, 211 and 358 on the one hand, together with the statutory right of aggrieved persons to institute civil suits to recover from defaulters in ss 199, 201, 210 and 357 on the other hand, all of which appearing alongside the criminal enforcement powers of the SC in the same piece of legislation that is CMSA.

**[37]** In situations relevant to the enforcement of private right under ss 199, 201(1) and 210, it is difficult to appreciate the practicality of the person who suffers loss having to first secure a determination by the SC that a relevant breach has indeed been committed, before the private suit may be allowed to progress. I again stress that none of these provisions, now firmly in the CMSA, was previously found in the SCA and their relevance did not therefore have to be considered by the Court of Appeal in *Shahidan bin Shafie*. The predecessor provisions were contained in the now repealed Securities Industry Act 1983. In the case of *Wong Lai Yoke & Ors v Mayban Securities Sdn Bhd and another appeal* [2014] 4 MLJ 731; [2012] 1 LNS 1424, whilst the Court of Appeal affirmed the decision not to award damages to an investor for losses suffered due to negligent investment advice under the civil remedy provision contained in s 88A of the SIA (presently substantively in s 199 of the CMSA) the reason was for the lack of evidence and not the absence of any determination by the SC, which issue was never raised or in any manner deemed relevant.

**[38]** Neither was s 360 of the CMSA ever part of the SCA, although it was originally enacted in s 100 of the Securities Industry Act 1983, and thus similarly did not have to be dealt with in *Shahidan bin Shafie.* As stated earlier, s 360(1)(d) permits an aggrieved person to make an application to the High Court for various remedies specified in the said s 360(A)–(O), provided it could be shown that 'it appears' to the court that the other person has contravened the relevant requirement such as the mandatory general offer rule, and that the applicant investor is aggrieved by such contravention. As stated earlier, the SC too has a similar right under s 360(1)(a), as does the stock exchange under s 360(1)(c). Both have successfully invoked the provisions of s 360(1) and obtained various orders, as reported in the Federal Court case of *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733; [2016] 3 CLJ 19 and in the Court of Appeal case of *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158; [2012] 8 CLJ 678, respectively.

**[39]** Again, the plain reading of s 360(1)(d) does not specify any hurdle against the aggrieved person before he can make an application to court. In fact, the threshold to address is to establish that it 'appears' to the court considering the application that the applicant is aggrieved by the breach of a relevant requirement which, in this case, includes the infringement of the mandatory offer provisions. In *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158; [2012] 8 CLJ 678, Ramly Ali JCA (as he then was), delivering the judgment of the court, held the following pertinent aspect on the scope of s 360:

> (3) The court's power to make an order under s.360(1)(c) of the CMSA could be invoked if 'it appears to the court that any person has contravened a relevant requirement'. The use of the word 'appears' instead of 'proved' indicated a lower standard of proof. The deliberate absence of the word 'proved' in that section meant the court should not have to require strict proof or be satisfied beyond doubt when making findings of fact on breach of the LR pursuant to s 360(1)(c). The use of the word 'appears' should be seen to allow room for a reasonable margin of probabilities. *The court acting under* s 360(1)(c) *was therefore called upon to determine the facts of a breach of the LR by a lower standard of proof which did not equate to certainty by strict proof.* (Paras 39 & 44.)
>
> (4) In the present case, the phrase 'appears to the court' indicated a state of mind of the court as to the affidavit evidence presented before it to arrive at or be satisfied of the conclusion that there had been a breach of the LR and that the breach was committed by the appellants. The High Court came to the correct finding in exercising its discretion under s 360(1)(c) in granting the various orders prayed for by the respondent. (Para 50.) (Emphasis added.)

**[40]** It is observed that in that case, the listing committee had found the appellants to be in breach of the relevant provisions of the listing requirements of the stock exchange, and penalties had also been meted out as a consequence thereof. In the instant case, there is no finding by any authority such as the SC that there was even a breach of the mandatory offer provisions to start with. I see no deficiency on the part of the plaintiff in the instant case to make an application under s 360(1)(d). Fundamentally the crucial issue is to satisfy the court that there is evidence of the plaintiff being aggrieved by the alleged breach of the relevant requirement. The fact that in *Tengku Dato' Kamal*, there was a finding of contravention by the listing committee of the stock exchange does not mean that there must be some form of finding as a prerequisite for the plaintiff to succeed. The stock exchange itself did not get the SC to give a prior ruling on the breach. This is not unexpected for the listing requirements are primarily for the stock exchange to enforce, not the SC. The orders sought from the court were to give effect to the penalties earlier imposed by the listing committee which were ignored by the appellants. Thus it was only to be expected that the various evidence pertaining to the actions taken by the stock exchange, including the penalties imposed and the in-house appeal process, all provided for under the listing requirements, should be made available before the court could consider the application. In the instant case, the contravention is alleged to have been against the letter of the law enacted in s 218(2) of the CMSA on the requirement to make mandatory offer following the taking over of control by parties said to have been acting in concert. The nature of the order in *Tengku Dato' Kamal* is therefore very different from the orders prayed for by the plaintiff in the instant case since there are no similar 'in-house' or administrative procedures that the SC must pursue in all cases involving allegation of a breach of s 218(2) that must be shown to have been done, such as by making a ruling, before s 360 can be pursued by an aggrieved person. I stress that if a prior ruling is somehow obtained, it can surely be used by an aggrieved person to support his application that would no doubt be strengthened, but it is not the law that such a ruling on whether there was a breach of the mandatory offer provision must as a pre-condition accompany any such application under s 360(1) by an aggrieved person. He could present other evidence of the alleged contravention, including for instant, pertinent trading records of the defendants and their relationship with one another, and satisfy the court that it appears to the court that the plaintiff is aggrieved by the contravention on the part of the seven defendants.

**[41]** To my mind, the existence of the various provisions as legislated in the CMSA that I have alluded to, signifies two important points. First, it further reinforces the regulatory philosophy that promotes shareholder activism which includes encouraging them to initiate various actions directly and secondly, it nevertheless maintains the ability of the regulators, in particular the SC to also have similar powers, in addition to its existing arsenal of enforcement capabilities, in keeping with the overarching rationale of ensuring strong

supervision of the capital markets, and firmly supported by the legislative provisions on criminal, civil and administrative actions, and with the civil actions to be complemented by way of private litigation as well. And there is as such no reason for the CMSA to be construed to impose the requirement that to justify private litigation, the consent or ruling of the SC is to be made a prerequisite; not for take-over provisions, nor for any other provisions in the CMSA where the right of investors to sue defaulters for recovery is so expressly permitted.

*Scope of s 357 — Ruling necessary for other Divisions of Part VI?*

**[42]** Even focusing on s 357(1), it is plain that the right to commence a suit is only applicable for transgressions of provisions of Part VI of the CMSA. This Part VI however comprises six divisions. Other than for takeovers, the others are in respect of new issue of securities, prospectus, debentures, unit trust schemes and Islamic securities. It would not seem appropriate for a ruling or determination by the SC be required before a suit by an aggrieved person could be instituted in respect of breaches under those other divisions.

**[43]** Another aspect of relevance is the applicability of the time limitation to an action under s 357(2) which is stated to be within six years from the date of accrual of action or awareness of breach, whichever is the later. If a determination by the SC is a prerequisite, the aggrieved person may not benefit from the entire duration of six years, or not at all if the determination or ruling requested for is never forthcoming.

*Ruling is necessary only for take-overs situations?*

**[44]** Even the possible contention that the prior ruling of the SC under s 357(1) is necessary only for takeover situations is not free from difficulties. After all, the term 'ruling' is only found in Division 2 concerning takeovers. First, under s 217(4), the SC has the discretion, not the obligation to issue rulings on the interpretation of the Code, on the practice and conduct of parties involved in takeover offers. The provision reads thus:

> (4) The Commission shall administer the Code and may do all such things as may be necessary or expedient to give full effect to the provisions of this Division and the Code and without limiting the generality of the foregoing, may:
>
> (a) issue rulings:
>
> (i) to interpret this Division and the Code;
>
> (ii) on the practice and conduct of persons involved in or affected by any take-over offer, merger or compulsory acquisition, or in the course of any take-over, merger or compulsory acquisition; and

(b) enquire into any matter relating to any takeover offer, merger or compulsory acquisition whether potential or otherwise, and for this purpose, may issue public statements as the Commission thinks fit with respect thereto.

**[45]** Secondly, this provision does not state that a ruling would be necessary under s 357. Thirdly, the ruling as stated under sub-s (4) is to give effect to the provisions of the CMSA on takeovers and the Code, chief of which that seeks to uphold the principle of fair and equal treatment to all shareholders is the mandatory offer requirement, whereas the crux of s 357 is the different emphasis of private litigation recovery by parties who suffer losses due to breaches. Fourthly, the statutory obligation to undertake a mandatory general offer arises from the requirement in s 218(2) imposed on an acquirer who has acquired control (together with any parties acting in concert). However, countless mandatory general offers have taken place in the country pursuant to acquisitions triggering s 218(2) and (3) of the CMSA, without the necessity of the SC first issuing a ruling to confirm the need to do so. It is true that in most of these, there were probably no dispute that mandatory offers had to be made, and thus were indeed carried out. But if there is a dispute it does not have to mean that the SC must provide a ruling on its finding before the matter can be pursued by an aggrieved investor under s 357.

**[46]** Quite apart from the focus of *Shahidan bin Shafie* being the provisions in the SCA which have since been revoked and subsequently re-enacted in the CMSA, it is true that the case actually recognises that the former s 153 did indeed confer on those aggrieved by a relevant breach the right to recover from the person in default by way of civil proceedings. The Court of Appeal examined the apparent conflicting decisions of the High Court involving the non-making of mandatory offers in *Tuan Hj Zulkifli bin Hj Hussain & Ors v IOI Corp Bhd & Ors* [2012] 7 MLJ 215 ('*Tuan Hj Zulkifli*') which ruled no private cause of action exists on the one hand, and in *Extreme System Sdn Bhd v Ho Hup Construction Company Bhd & Ors* [2010] MLJU 487 ('*Extreme System*') which held to the contrary, on the other hand. The High Court in *Tuan Hj Zulkifli* examined other prevailing statutory provisions of the SCA then in force, especially ss 33A(9) and 33A(10), made no reference to s 153 in the judgment, and concluded that on a proper construction of the statute, no cause of action was available to the claimants for breach of statutory duty in tort. In the case of *Extreme System*, the High Court referred to an earlier case of *Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor* [2003] 6 MLJ 49 ('*Aun Huat*') the facts of which then at the material time similarly did not have the benefit of s 153. However, the High Court in *Aun Huat* concluded that on the construction of the relevant provisions of the SCA, in particular s 33A(9), the breach on the part of the defendants to undertake a mandatory general offer did give rise to a private cause of action. This is how the learned High Court judge addressed the issue:

Neither the SCA nor the Code provided in any definite statutory form any civil remedy against the errant acquirer who refused to undertake the MGO. Although s 33(9) of the SCA per se would not be sufficient to warrant a construction that the SCA imposed a liability to civil act upon the plaintiffs, it supplied a clear index of the intent of the Legislature to expose any errant party who failed to observe the code to both criminal and civil proceedings. Therefore, to succeed, the plaintiffs must establish not only that the relevant provisions of the SCA and the Code were enacted to protect a class of individuals to which they belonged but also that it was intended by the Legislature that the breach thereof would confer upon them a private right of action. Having examined the SCA as a whole, it was clear that the SCA was enacted for the ultimate protection of investors in general and specifically under Part IV thereof, the protection of the existing shareholders of the company affected by a take-over or merger. Section 33A(9) of the SCA had specifically exempted the errant acquirer from criminal prosecution under the SCA, and as such, it would appear all the more likely that the Legislature had not intended to preclude the right of shareholders aggrieved by the failure to make the MGO to seek legal redress under the SCA. Therefore, there was a breach of statutory duty on the part of the defendants in failing to make the MGO and the breach gave rise to a private cause of action. The position may now be different with the deliberate amendment in 1999 to the SCA by providing a new provision in s 33B(4) to make any non-compliance of the Code a criminal offence, which by contrast would now provide a strong indicator that the Legislature had now had a change of mind to disallow a private cause of action (see pp 75C–G, 79C, F); *Lonrho Ltd v Shell Petroleum Co Ltd & Anor (No 2)* [1982] AC 173 followed.

**[47]** It is crucial to observe that *Aun Huat* had to embark on the requisite analysis on whether the relevant statutory provisions could be construed as creating a private cause of action because of the patent absence, at the material time, of any legislative provisions in the SCA then which clearly provide for such a right. Similarly, *Tuan Hj Zulkifli* too did not consider s 153. The High Court in *Extreme System* (which had referred to *Aun Huat*) did however have the opportunity to consider s 153, even though the said s 153 was similarly inapplicable to the facts in *Extreme System* as it was already by then repealed, with the view to its incorporation in the CMSA which had at that juncture not yet occurred (but already well in place at the time of *Shahidan bin Shafie*). The relevant passage from the judgment in *Extreme System* reads instructively as follows:

28. With respect, I am unable to agree with the submission by counsel for the defendants that the common law private cause of action, recognised in *Petaling Tin*'s case and *Aun Huat*'s case, would have been abrogated by the enactment and coming into force of s 153 of the SCA on 1 September 1999. *Instead,* s 153 of the SCA *shows the clear intent of the legislature to expose any errant party who has failed to observe the Code to a claim for damages.* I do not think that s 153 of the SCA could have deprived a litigant from his other common law rights. In *Petaling Tin*'s case, the relief granted by the Supreme Court was a declaration.

29. Accordingly, I find that the repeal of s 153 of the SCA with effect from 28 September 2007 (PU(B) 342 and 343) by the Securities Commission (Amendment) Act 2007 did not affect the existing private law cause of action under the SCA and the Code. This is more so when s 153 of the SCA was intended to be replaced by s 357 of the CMSA, which provided for a similar cause of action for damages. Section 357 of the CMSA has not been bought into force yet. Notwithstanding, I do not see these amendments as reflecting an intention by the legislature to take away the private law cause of action. (Emphasis added.)

**[48]** I should for completeness add that the High Court decision in *Extreme System* was overruled by the Court of Appeal in *Low Chee & Sons Sdn Bhd & Anor v Extreme System Sdn Bhd and another appeal* [2013] 1 MLJ 650, although primarily by reason of the Court of Appeal concluding that there were disputes of facts which made the case unsuitable to be dealt with, as done by the High Court, under O 14A of the Rules of the High Court 1980.

**[49]** In my analysis, apart from the High Court decisions in *Aun Huat, Extreme System* and *Tuan Hj Zulkifli* which attempted to answer the question whether a breach of the obligation to make a mandatory general offer gives rise to a private cause of action against the party in breach, it does not seem that other local case law authorities, even the Supreme Court decision in *Petaling Tin Bhd v Lee Kian Chan* [1994] 1 MLJ 657; [1994] 2 CLJ 346 decidedly consider the point directly. Even the English authorities, including the leading House of Lords decision in *X (Minors) v Bedfordshire County Council* [1995] 3 WLR 152 concern the situation, as acknowledged by the learned judge in *Tuan Hj Zulkifli,* where the private action was sought to be established against statutory authorities who were alleged to have breached their duties under the applicable legislation, which is quite unlike the line of local cases dealing with possible private actions in response to breaches of the requirement to make a mandatory general offer by the relevant acquirers, and not against the pertinent securities regulator, namely the securities commission, for any transgression of its statutory duties.

**[50]** It is noteworthy that although the ruling of the Court of Appeal in *Shahidan bin Shafie* appears to expressly recognise the qualified existence of the private cause of action under s 153, the Court of Appeal further examined other provisions of the SCA, in particular ss 33A and 33D in considering the true scope of s 153, and in answer to the specific question whether it is the intention of Parliament to give a private cause of action for the breach in not undertaking a mandatory general offer stated the following as appearing in the judgment:

> It is our view that premised on the aforesaid provisions (s 33A and 33D of the SCA) it can be said that it is the intention of Parliament for the SC to be tasked to

supervise, regulate, issue ruling from time to time and enforce the practices of companies bound by the SCA and the Take-Over Code.

...

We agree ... that the Plaintiff's right to sue can only exist when the SC had made a ruling. In the case before us, the SC must first make a ruling that the Defendants had acquired control of Naluri in the context of the relevant law and was required to make the mandatory take-over offer to the shareholders of Naluri.

**[51]** I should add that ss 33A and 33D were also considered by the decision of the High Court in *Shahidan bin Shafie v Atlan Holdings Bhd & Anor* [2013] 7 MLJ 215; [2013] 4 CLJ 1029 which ruled the absence of a private cause of action but however made no mention of s 153. At this juncture it is perhaps apposite to reproduce the relevant parts of the provisions of ss 33A and 33D of the SCA. These have since been repealed but now enacted word for word, in ss 217 and 220 of the CMSA respectively. Basically they reinforce the role of the SC in the administration and enforcement of the Code. The pertinent parts read as follows:

Section 33A(4)

The Commission shall administer the Code according to the objectives specified in subsection (5) and may do all such things as may be necessary or expedient to give full effect to the provisions of this Division and the Code; and without limiting the generality of the foregoing, may:

(a) issue rulings from time to time, interpreting the Code;

(b) issue rulings on the practice and conduct of persons involved in or affected by any take-over offer, merger or compulsory acquisition, or in the course of any take-over, merger or compulsory acquisition; and

(c) enquire into any matter relating to any take-over offer, merger or compulsory acquisition whether potential or otherwise, and for this purpose, may issue public statements as the Commission deems fit with respect thereto.

Section 33A(5)

In making any recommendation under subsections (1) and (2) and in administering the Code and exercising its powers under this Act, the Commission shall take into account the desirability of ensuring that the acquisition of voting shares or control of companies takes place in an efficient, competitive and informed market and, without limiting the generality of the foregoing, shall have regard to the need to ensure:

(a) that the shareholders and directors of an offeree and the market for the shares that are the subject of the take-over offer:

(i) are aware of the identity of the acquirer and offeror;

(ii) have reasonable time in which to consider a take-over offer; and

(iii) are supplied with sufficient information necessary to enable them to assess the merits of any take-over offer.

(b) that, so far as practicable, all shareholders of an offeree have equal opportunities to participate in benefits accruing from the take-over offer, including in the premium payable for control;

(c) that fair and equal treatment of all shareholders, in particular, minority shareholders, in relation to the take-over offer, merger or compulsory acquisition would be achieved, and

(d) in its response to, or making recommendations with respect to any take-over offer, merger or compulsory acquisition, the directors of the offeree and acquirer shall act in good faith to observe the objects, and the manner in which they observe the objects, specified in this subsection, and that minority shareholders are not subject to oppression or disadvantaged by the treatment and conduct of the directors of the offeree or the acquirer.

Section 33D(1)(a)–(g)

Where any person who is under an obligation to comply with, observe or give effect to the provisions of the Code or any ruling made under subsection 33A(4), fails to comply with, observe or give effect to any such provision of the Code or ruling (hereinafter referred to as the 'defaulting person'), the Commission may take one or more of the following actions:

(a) direct the defaulting person to comply with, observe or give effect to any such provision of the Code or ruling;

(b) impose a penalty not exceeding two hundred and fifty thousand ringgit on the defaulting person;

(c) reprimand the defaulting person;

(d) direct a stock exchange or deprive the defaulting person access to the facilities of the stock exchange;

(e) where the defaulting person is a listed corporation, direct the stock exchange:

(i) to suspend trading in the securities of the corporation;

(ii) to suspend the listing of the corporation; or

(iii) to remove from the official list the corporation or the class of securities of the corporation;

(f) where the defaulting person is a corporation that is not listed, direct any stock exchange to prohibit the listing of any of its securities; or

(g) direct a stock exchange to prohibit the defaulting person from engaging in transactions to be executed through the use of the facilities of the stock exchange.

Section 33D (2)

The Commission shall give a written notice to a defaulting person of its intention to take action under subsection (1) and shall give the defaulting person an opportunity to be heard prior to it taking any action under subsection (1).

Section 33D(3)

The Court may, in a case where the Commission gives a direction under paragraph (1)(a), on an application by the Commission, make an order directing the defaulting person to comply with, observe or give effect to those provisions of the Code or rulings.

**[52]** The Court of Appeal then significantly added as follows:

If we were to adopt the interpretation of s 153 SCA of the plaintiff, it would amount to the court stepping into the shoes of the SC ... That is not and cannot be the intention of Parliament ... Our interpretation.... that the private cause of action for breach of statutory duty is preserved to the extent only after SC has made a specific ruling. This would avoid a situation where there would be two decisions, one of the court and the other the SC. Our interpretation allows only one decision at one time and that is the decision of the SC until the same is either set aside or substituted by the courts ...

**[53]** I reiterate that the decision in *Shahidan bin Shafie* is based on the construction of s 153 of the SCA. That specific statutory provision has since been repealed, and although subsequently resurrected in identical version, it was removed from the SCA and instead now found in s 357 in an entirely different legislative framework and contextual existence of the much consolidated CMSA, justifying a fresh examination of the true jurisdictional remit of s 357.

**[54]** In the context of the CMSA, there is in my view, no conceptual difficulty with the notion that an investor who suffers loss as a result of a breach of the mandatory general offer obligation pursues a civil recovery action against the person in breach without a prior ruling from the SC determining whether there is a breach in the first place. If there is no impediment in the law for the courts to make a judicial determination on the issue ultimately if and when the question is subsequently brought to court after the SC has made its ruling, there is no cogent basis to suggest that the courts should not consider the same prior to any determination by the SC. This is especially since s 357 does not even imply that a ruling from the SC is a *sine qua non* to an institution of civil proceedings by a person who suffers loss, and where the regulatory philosophy in the CMSA clearly envisages alternative modes of enforcement actions against the persons in default, with a private cause of action, unfettered by any requirement to nevertheless still involve the SC, clearly being one of them. This is not to say that a ruling by the SC would be entirely unnecessary for in my

view should the court hold that a breach has been proven and the parties in default must make a mandatory general offer, a consequential ruling by the SC on the key parameters governing the conduct of the making the offer would be required to facilitate the administrative and logistical process. This would be imperative only in situations where the procedures in the Code cannot be strictly followed given the delay in the making of the same since under the law as stated in s 11 of the Code, once the obligation is triggered, the acquirer must immediately make an announcement to start the takeover process, as this has critical relevance to the share price of the target company at the material time of the acquisition.

**[55]** It may not be an inaccurate a proposition to make that it could potentially be undesirable for the courts to consider the relevant questions before the SC does so, given its responsibility which is undeniably tasked with the overall regulatory and supervisory oversight of the conduct of take-overs subject to the Code in the country. However, in the larger scheme of things that is the CMSA, it cannot be overlooked that the statutory functions of the SC have been stated in s 15(1) of the SCA which remains well in force. These include to regulate the take-overs and mergers of companies (para (d)), but also the following functions:

> (b) to regulate all matters relating to the capital market;
>
> ...
>
> (c) to ensure that the provisions of the securities laws are complied with;
>
> ...
>
> (g) to take all reasonable measures to maintain the confidence of investors in the capital market by ensuring adequate protection for such investors;
>
> (h) to promote and encourage proper conduct amongst participating organisations, participants, affiliates, depository participants and all licensed or registered persons of an exchange, clearing house and central depository, as the case may be;
>
> (i) to suppress illegal, dishonourable and improper practices in the capital market, and the provision of investment advice or other services relating to the capital market;
>
> ...

**[56]** The further reference to the role of the SC vis a vis takeovers now found in s 217 of the CMSA (previously s 33A of the SCA) in addition to what is stated in s 15 of the SCA is attributable to the history of the enactment of the takeover provisions in the country. Prior to the establishment of the SC in 1993, take-over offers were governed by the Malaysian Code on Take-Over and

Mergers 1987, and administered by the Panel on Take-Overs and Mergers. Technically the then Code was issued pursuant to s 179 of the Companies Act 1965 which was purely a general enabling provision, and subsequently repealed by the SCA when the latter first came into force in 1993. With the enactment of the provisions of what used to be deemed as guidelines into legislative rules, a special prominence was thus given on the transformational legal status of the takeover provisions, which now even include the creation of a criminal offence for any failure to make mandatory offers as well as for defective disclosure in offer documentation. The Code was originally heavily modelled upon the UK's The City Code on Takeovers and Mergers, which was also the premise for similar takeover codes applicable in Hong Kong (The Codes on Takeovers and Mergers and Share Buy-Backs) and Singapore (The Singapore Code on Takeovers and Mergers). Unlike in Malaysia, in these other jurisdictions, contravention of the takeover provisions, in particular on mandatory general offers, do not attract criminal sanctions. For the purpose of this judgment however, the point of emphasis is that considering the entirety of the CMSA it is plain that the SC is responsible for the regulation and supervision as well as enforcement of the entire capital and securities markets in the country, in as much as it is the key authority entrusted by statute to supervise takeovers, which is a subset of the larger capital and securities markets.

**[57]** It is in my view both compelling and irresistible therefore that the intention of Parliament in this regard has been made crystal clear by s 357 and other similar provisions in ss 199, 201 and 210. I identified in the earlier part of this judgment that seek to promote greater shareholder activism and encourage private litigation as a means to complement the enforcement initiatives of the SC in its regulation of the capital markets in the country.

**[58]** Nor are the experiences in other countries with not dissimilar securities regulatory frameworks supportive of the proposition which requires the ruling or determination be first made by the regulators before the private cause of action could be pursued. The literature on private securities regulation in these countries does not seem to have any reference to a rider in the form of a determination by the relevant regulators before the investors can institute any civil claims for losses they suffer as a result of a breach by another party. In Australia, shareholder class actions are the most common type of private securities litigation, although suits can also be filed by way of individual as well as a derivative action. Under ss 1041I and 1317HA of the Corporations Act 2001 (Cth), shareholders who suffer loss as a result of infringement by others of certain requirements, may bring an action for damages either individually or by way of a class action. In England, as an example, s 90 of the Financial Services and Markets Act 2000 provides a cause of action to an investor where a prospectus or listing particulars relating to securities contain any untrue or misleading statement, or if they fail to include information that they are

required by statute to include. These provisions do not appear to contain any requirement for a determination or ruling by the relevant regulatory authority must first be obtained before the investor can pursue his private suit against the person in breach.

**[59]** The fundamental and pivotal point is for all intents and purposes, for the claimant to establish his case of a contravention by the alleged defaulter occasioning a loss to the former on the civil standard of proof of a balance of probabilities. This requires the parties to invoke the civil litigation court processes and procedures principally in respect of pleadings and discovery to present a case of contravention of the relevant mandatory offer provisions.

**[60]** Thus, regardless, even if the ruling of SC is made mandatory, ultimately if the matter is challenged, the issue would still have to be adjudicated by the court which may or may not arrive at a finding on a breach or the existence of parties acting in concert consistent with the ruling made by the SC. This is true for both civil and criminal proceedings. The court will make the pronouncement of breach or otherwise. In a sense the SC is like other enforcement bodies such as the police, the MACC, and the Central Bank which investigate and enforce the laws under their respective jurisdictions. It can be stated, albeit at the risk of being simplistic, that if the authorities do not take action, which can be for many valid reasons, it does not mean that an individual who claims to suffer loss as a result of a breach by another person of the law under the purview of the relevant authority cannot file a civil claim by reason only that the said authority has not made a determination on the alleged contravention.

**[61]** Accordingly, requiring a ruling by SC to be obtained before a private action under s 357 (and s 360) is an unnecessary requirement and may tantamount to an unwarranted impediment to and unnecessary fetter on the statutory right of an aggrieved person to seek recovery by way of civil proceedings expressly conferred by the CMSA which was in any event introduced to promote the institution of private enforcement actions by shareholders in the first place.

## THE LAW ON STRIKING OUT

**[62]** The leading authority on O 18 r 19(1) is the Supreme Court decision in *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, and in particular the following part of the judgment of Mohamed Dzaiddin SCJ (as he then was):

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process

under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86 at p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of Duchy of Lancaster v L & NW Ry Co* [1892] 3 Ch 274, CA). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA). The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O 33 r 3(which is in *pari materia* with our O 33 r 2 of the Rules of the High Court) (*Hubbuck v Wilkinson*). The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

**[63]** The case of *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 has authoritatively established that the power of the court to strike out under the four grounds of O 18 r 19(1) is to be exercised when it can clearly be determined that a claim or answer is prime facie obviously unsustainable. It is therefore only to be invoked sparingly (see *Affin Bank Bhd v Eye Bee Sdn Bhd* [2005] 7 MLJ 1).

**[64]** The ground relied on by the defendants is that the statement of claim of the plaintiff does not disclose a reasonable cause of action under O 18 r 19(1)(a). Case law authorities have also established that for as long as the statement of claim discloses some cause of action or raises some questions fit to be tried, the mere fact that the case is weak or is unlikely to succeed is not relevant (see *Nescajaya Sdn Bhd v Suairah bt Parigula & Ors* [2011] 9 MLJ 774). No affidavit evidence is admissible under O 18 r 19(1)(a) (see *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2013] 3 AMR 385) and perusal is only to be made of the pleadings to determine if it discloses a reasonable cause of action, which in turn is described by a leading English case of *Letang v Cooper* [1965] 1 QB 222 to be referable to the factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

**[65]** As stated earlier, the basis for the striking out application is the argument on the absence of locus standi resulting in the claim by the plaintiff not disclosing a reasonable cause of action under limb (a) of r 19. As I have discussed, I do not consider the contention that the plaintiff does not have a private cause of action in the absence of a ruling by the SC to be a tenable interpretation of s 357 of the CMSA. A perusal of the statement of claim would almost readily show that the claim is for the various remedies the plaintiff seeks as a result of the non-making of a mandatory offer under s 218(2) that the plaintiff asserts the seven defendants are under an obligation to do, having allegedly as concert parties, obtained control of the eighth defendant company. The claim is thus precisely to get the court's assistance for various remedies for

being an aggrieved party who suffers loss as a result of the defendants' alleged transgression in pursuance of ss 357 and 360 of the CMSA.

**[66]** In my view, this more than sufficiently discloses a reasonable cause of action in the claim filed by the plaintiff. In any event, as the issue in the instant case is predominately if not entirely one on a question of law, having decided on the existence of locus standi without the necessity for a prior ruling be made by the SC under ss 357 and 360 it is inescapable that the striking out application cannot succeed. It is unnecessary for me to consider whether at the same time, the tort of unlawful means conspiracy would be separately substantially justified to defeat the striking out application by the seven defendants. It thus follows that the claim by the plaintiff is not one which is 'obviously unsustainable' or in any manner liable to be struck out under O 18 r 19(1).

CONCLUSION

**[67]** In view of the foregoing reasons, it is my judgment, considering primarily the legislative framework of the CMSA, that the plaintiff is sufficiently conferred by s 357 of the CMSA the locus standi to institute civil proceedings against the seven defendants to seek the remedies for the loss he claimed to have suffered by reason of the alleged contravention of the mandatory general offer provisions of s 218, and it is competent for the plaintiff to exercise such private cause of action without the necessity of the SC first making a ruling on the breach in question.

**[68]** Accordingly, I dismiss the applications to strike out the plaintiff's claim made by the defendants in encls 15, 16 and 17, with costs.

*Application dismissed.*

Reported by Afiq Mohamad